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I. Codes

In Switzerland – in comparison e.g. with the Netherlands – there is no general code on administrative law. Administrative procedure is both regulated by specific acts on the federal and on the cantonal level. Many of the general principles and ideas of Swiss administrative law are derived from the Constitution and formed by case law of the Swiss courts, mainly the Swiss Federal Supreme Court.

In contrast, administrative law incorporates a myriad of subject matter laws such as laws on citizenship, political rights, education, science, and culture, national defence, financial issues, public works, energy, transportation, health, employment, social security, or the economy and technical cooperation. According to a 2013 survey, there are 4'768 laws (over 65'000 pages) on the federal level alone. In addition, there is an abundance of cantonal laws (although the amount is quite diverse from canton to canton). The cantons exercise all rights that are not vested in the Confederation (Article 3 Constitution);[1] hence there are a great number of cantonal statutes. Cantonal acts typically deal with subjects like police, planning and building, schools, or health care.

1 Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101; see for an English version of the Constitution www.admin.ch (https://perma.cc/M8UJ-S369).

II. Principles of Administrative Action

1. Constitutional Principles in Administrative Law

The relationship between constitutional and administrative law may be characterized as one of *mutual influence*. Administrative law and practice give real substance to the meaning of the Constitution. Some constitutional provisions can be best understood through the lens of the relevant administrative statutes, especially in areas where independent constitutional thinking remains underdeveloped, for example the area of state liability. On the other hand, constitutional principles are essential for the proper application of administrative law.

The key principles of legality, public interest, and proportionality are laid down in Art 5 Constitution (Article 36 Constitution in respect to the restriction of fundamental rights).[2] Article 9 Constitution constitutes the protection against arbitrary conduct and principle of good faith and therewith the basis for the doctrine of legitimate expectations.

2. Principle of Legality

a) Legal Basis for Administrative Action

The principle of legality (or the rule of law) is prone to many different understandings and, more problematically, many misunderstandings. Most legal traditions foster distinct traits of this principle, and even when internationally

2 See Thomas Fleiner/Alexander Misic/Nicole Töpperwien, Constitutional Law in Switzerland, Alphen aan den Rijn 2012, pp. 209, Patricia Egli, Introduction to Swiss Constitutional Law, Zurich/St. Gallen 2016, pp. 107.

understood terms like "the rule of law" are used, the precise meaning often differs from country to country. In essence, the principle of legality refers to the idea of restraining governmental power through law.

It seems that the principle of legality is more comprehensively applied in Switzerland than in other countries, though in a rather flexible manner. The cornerstone of the Swiss concept of legality is that every form of administrative action must be traceable back to a statutory provision: *"All activities of the state are based on and limited by law"* (Article 5 I Constitution). This provision's emphasis is on finding a basis that justifies state actions *within the law*.[3]

b) Legality of the Law

It is important to realize that the principle of legality is not only a challenge to administrative action without a sufficient legal basis but is also a powerful tool directed *against the law* itself. The principle requires that the legal basis satisfies *minimal qualitative requirements*.[4] There are two key qualitative requirements in Switzerland: first, the legal basis may not be *unduly vague* and second, *important decisions* must be taken by the *legislator*.

The first prohibition which prevents the creation of *unduly vague* law under the principle of legality is a commonly accepted principle. The Swiss Federal Supreme Court requires that the law must be precise enough to allow citizens to adjust their behaviour according to the legal requirements and to foresee the legal consequences of their behaviour.[5] May the legislator, e.g., just stipulate that billboards on houses must be "aesthetically satisfying" and leave the concretization of this rule to administrative agencies and courts? The Swiss Supreme Court has accepted such legislation, acknowledging that every law necessarily contains some vagueness due to its abstract nature, as well as other factors like the limitations of language, the impossibility of regulating every potential future situation, and the need to allow administrative discretion in the performance of official acts or duties.[6] The standard of review is higher in cases where there have been significant restrictions, typically those

3 Ulrich Häfelin/Georg Müller/Felix Uhlmann, Allgemeines Verwaltungsrecht, 7th edition, Zurich/St. Gallen 2016, n. 325 et seq.; Pierre Tschannen/Ulrich Zimmerli/Markus Müller, Allgemeines Verwaltungsrecht, 4th edition, Bern 2014, § 19 n. 1 et seq.; Egli, pp. 24.

4 Häfelin/Müller/Uhlmann, n. 338 et seq.; Tschannen/Zimmerli/Müller, § 19 n. 14 et seq.

5 BGE 139 I 280, consideration 5.1.

6 BGE 139 II 243, consideration 10; Häfelin/Müller/Uhlmann, n. 344.

which engage fundamental rights.[7] A more deferential standard of judicial review is typical in cases which concern technical areas of the law and where legal areas that are notoriously difficult to regulate are at issue, such as foreign policy.[8]

The second requirement is that important decisions must be taken by the legislator. The legislator must decide on every important aspect of regulation, as opposed to allowing government or administrative bodies to do so: *"All significant provisions that establish binding legal rules must be enacted in the form of a Federal Act"* (Article 164 I Constitution). E.g., court practice has established that fees and levies must be regulated by the law, which must clearly identify who must pay what amount in respect of which service.[9]

Hence, the legal basis of administrative action may be challenged either because of over-vagueness or the lack of legislative basis regarding a certain point of law. If the rule applicable in a certain case covers an important question yet was not enacted by the legislator itself, the principle of legality is violated, even if the rule was precise enough and correctly understood by the administrative authorities.[10] It is obvious that the second requirement is closely connected to the matter of delegated or secondary legislation, which will now be discussed in further depth.

c) Delegated Legislation

Delegated legislation is legislation that the parliament has conferred to the executive branch. It comes in two forms: 1. purely executive and 2. quasi-legislative.

In the first case legislation merely "fills in the gaps" in the law or simply defines a broad term in the law more precisely; here, no delegation clause is needed. The power to enact secondary legislation stems directly from the constitutional mandate of the government to implement and execute legislation (Article 182 Constitution).[11]

Secondary legislation is considered quasi-legislative if it creates new obligations or deviates from the law; in these cases, a delegation clause is required.[12]

7 BGE 130 I 360, consideration 14.2.
8 Cf. Häfelin/Müller/Uhlmann, n. 389.
9 Cf. BGE 135 I 130, consideration 7.2.
10 Cf. Häfelin/Müller/Uhlmann, n. 351 et seq.
11 Cf. BGE 141 II 169, consideration 3.3; Häfelin/Müller/Uhlmann, n. 100.
12 Häfelin/Müller/Uhlmann, n. 96 et seq.

The delegation clause must fulfil the following prerequisites: 1. The delegation must not be excluded by the Constitution. 2. The delegation clause must be found in the law itself. 3. Delegated legislation can only regulate precisely predefinded and limited aspects. For example, the legislator may not leave it up to an autonomous administrative body to regulate the way it employs its workers: such a competence is simply too broad. 4. Finally, the legislator must outline the broad strokes of the regulation. The legislator must decide upon the important issues of the delegated matter. If any of these four prerequisites is not met, then the principle of legality is violated.[13]

d) Judicial Review

It is crucial to note that all aspects of the principle of legality may form the basis of an application for full judicial review. For example, a school-boy expelled for bad behaviour may claim that the authorities have no basis for expulsion in his case and thus that they have overstepped their competences. This is a challenge to the application of the law. The school-boy may also contend that his dismissal is unlawful because the statute it is based on is too vague, allowing the authorities unfettered discretion.[14] Alternatively, the school-boy may defy the legal basis claiming the expulsion should have been regulated by the law itself and not by secondary legislation due to the importance of the issue – a challenge that was successfully brought forward in 2013 against a school regulation targeting headscarves.[15]

3. Public Interest

The principle requires that *"state activities must be conducted in the public interest"* (Article 5 II Constitution). It is most relevant when taken in consideration together with other principles or rights, particularly regarding *proportionality*. The public interest principle essentially sets the benchmark for the proportionality test, by introducing the requirement to achieve a proper balance between public and private interests.[16]

13 Häfelin/Müller/Uhlmann, n. 368; Tschannen/Zimmerli/Müller, § 19 n. 38.

14 BGE 129 I 35, considerations 7.8 et seq.

15 BGE 139 I 280.

16 Häfelin/Müller/Uhlmann, n. 461 et seq.; Tschannen/Zimmerli/Müller, § 20 n. 1 et seq.

4. Proportionality

The principle of proportionality is a general requirement that all state action must meet (Article 5 Constitution) and a specific prerequisite in instances where fundamental rights are restricted (Article 36 Constitution).

As is the case with the German understanding of proportionality, in Switzerland the principle encompasses a *threefold test* based on the consideration of both the end pursued (which typically must be in the public interest) and the means employed. The means must be: (1) suitable (*geeignet*) to achieve the end; (2) necessary (*erforderlich*) in the sense that milder means prove inefficient and finally, (3) bearable (*zumutbar*), i.e. the end sought in the public interest must outweigh the compromised private interest of the individual. All three requirements must be satisfied, or the administrative action (or the law itself) will fail the test. For example, restricting helicopter flights from some ports to protect a certain area in the mountains proves "unsuitable" to achieve the aim if that area may easily be accessed through other ports not falling under the restriction;[17] a general prohibition on storing medication abroad on the grounds of better quality assurance is not "necessary" when a quality guarantee can be achieved simply by having the foreign competent authorities conduct inspections (assuming the petitioner's willingness to bear the additional costs).[18] Finally, although the public interest in the establishment of a natural reserve may outweigh the owner's interest in building houses in the centre of the reserve, it may be considered "unbearable" for the owners at the border of it.[19]

5. Legitimate Expectations

a) Basis

The protection of legitimate expectations is primarily based on Article 9 Constitution. The crucial starting point in determining whether legitimate expectations have been created and thus require protection is to evaluate the *basis* that triggered the expectation. The stronger the basis, the higher the level of protection will be. For example, a (formal) administrative act is a

17 BGE 128 II 292, consideration 5.1.

18 BGE 131 II 44, consideration 4.4.

19 BGE 94 I 52, consideration 3.

stronger basis than information provided by the authorities about an administrative issue.[20]

One may roughly rank the bases in order of the level of protection they will incur from courts. The most cogent basis for establishing a legitimate expectation is an *administrative contract*, which if permissibly concluded may even protect the private party against a subsequent adaptation of the law. Rights granted under an administrative contract may be "vested rights" (*wohlerworbene Rechte*), like the right to property.[21] This means that they may only be revoked where due compensation is offered.[22]

Substantial protection is also offered if a private party has relied on an administrative act (*Verfügung*). Administrative acts are the cornerstone of administrative action and are analysed in detail below. They have triggered numerous cases on legitimate expectations and a doctrine of *non-revocable administrative acts* has been developed.[23] Administrative acts by their very definition serve to clarify and settle a legal situation. They often govern a legal relationship, which exists over time. In practice it may often become necessary to adapt the administrative act if the legal or factual situation changes. In such a circumstance, however, the legitimate expectation principle can be invoked.[24]

Many cases involving legitimate expectations stem from government provision of *misinformation* or *incorrect advice*.[25] This basis is potent enough to lead to the non-application of the law in a specific case and more generally, even when this has the effect of seriously undermining both the law and the government itself. This may be the reason why the courts require that such advice is provided on an individual basis; general information displayed on the governmental website may not be sufficient to create legitimate expectations.[26] This approach is understandable in practical terms as preventing the chaos that could ensue from multiple claims being made on the basis of publicly available information. However, logically it is difficult to justify why one should have more trust in a single phone call to a civil servant than in information found in an official governmental announcement. Further requirements

20 Häfelin/Müller/Uhlmann, n. 668 et seq.
21 Häfelin/Müller/Uhlmann, n. 1237.
22 Häfelin/Müller/Uhlmann, n. 1242 and 1244.
23 Häfelin/Müller/Uhlmann, n. 628 and 1231.
24 Häfelin/Müller/Uhlmann, n. 1228.
25 Häfelin/Müller/Uhlmann, n. 667 et seq.
26 Cf. Häfelin/Müller/Uhlmann, n. 669.

developed by the courts for the establishment of legitimate expectations in this manner are that the advice was given without reservation, that it was given by the competent authority and that the factual and legal situation has not changed since the advice was given.[27]

Finally, no protection stems from *administrative passivity*.[28] In theory, this doctrine means that an illegal situation may never become legal under the doctrine of legitimate expectations. In such circumstances, the authorities can still intervene at any time, even if they tolerated the illegal situation for decades and the private person remained in good faith for the duration of this time. Simultaneously, it seems obvious that courts may be reluctant to uphold such an intervention by the authorities; it may even be relatively safe to assume that the court might find a solution in favour of the private party (possibly relying on the conceptually similar yet distinct principle of good faith, which will be discussed in the following paragraphs).

b) Legitimacy of Expectations

Regardless of the different potential bases of legitimate expectations, there is one key prerequisite which remains constant: the expectations must always be *legitimate*. This will not be the case if the private party was aware that the basis was unsound or erroneous. For example, a trained lawyer may not rely on governmental information if a simple review of the law would have proved it incorrect, although this may not be so clear-cut in the case of a layman who relies on such information.[29] Hence, an analysis of legitimate expectations is always conducted on a case-by-case basis and involves a consideration of all the details of the individual situation.[30]

c) Private Arrangements

Overall, legitimate expectations include situations where, on the basis of some expectation, an individual makes *arrangements* which conflict with the correct application of the law. Such arrangements made by individuals may be understood as the manifestation of legitimate expectations.[31] The protection is usually stronger if, for instance, a house has already been built based

27 Häfelin/Müller/Uhlmann, n. 676 et seq.
28 Cf. Häfelin/Müller/Uhlmann, n. 651.
29 Cf. for false instructions on the right to appeal BGE 135 III 374, consideration 1.2.2.2.
30 See e.g. BGE 137 I 69.
31 Häfelin/Müller/Uhlmann, n. 659.

upon building permit, i.e. an *administrative act* (*Verfügung*), in a zone not suitable for buildings and must be demolished. On the other hand, the protection of the individual's interests may be considered less substantial if only insignificant preparatory work for the house has been executed.[32] Clearly, if no arrangements have been made under a legitimate expectation, the principle is typically not applicable.

d) Causality

A fourth requirement for the protection of legitimate expectations is a *causal link* between the legitimate basis and the arrangements.[33] If the house in the previous example had been built before the faulty permit was given, obviously there would not be any causal link between the permit and the arrangements; thus, there are no legitimate expectations to be protected.

e) Balancing Test

The final step a court will take in determining whether a claim of legitimate expectations should be enforced is the conducting of a *balancing test* between the legality and the expectations. It may be that the basis for the expectations is sound and the (causal) arrangements are substantial but that they do not outweigh the advantages of ensuring the proper application of the law or, perhaps more precisely, the values and interests protected by that law.[34] For example, a person who has legitimately but falsely relied on a building permit will have to demolish his or her house if there is a high risk of avalanches in the area: the public interest clearly trumps the financial interests of the owner.[35] On the contrary, if the building permit falsely allowed the building of six stories in a zone where the maximum height is five stories, one may generally assume that the house would have to be maintained, provided that the expectations were legitimate in all other regards.

The last example illustrates the potential *power* the doctrine of legitimate expectations possesses: it may overrule the proper application of the law, because if allowing an exception to the law is the more suitable solution, courts will rather not apply the law in order to protect the legitimate expectations.

32 Häfelin/Müller/Uhlmann, n. 1252.

33 Häfelin/Müller/Uhlmann, n. 663.

34 Häfelin/Müller/Uhlmann, n. 664.

35 See Federal Supreme Court decision 1C_567/2014 of 14 July 2014, consideration 5.2.

The application of the principle is flexible, however. Alternative measures can be employed instead: for example, allowing for an additional deadline in cases where incorrect instructions on the right to appeal have been provided or transition periods in cases of abrupt and unexpected changes to administrative practice.[36] Compensation is and should be considered as a potential remedy, especially in those circumstances where in principle the legitimate expectations are justified but cannot be upheld in practice due to a more compelling public interest (for example, the aforementioned example of the building in a danger zone). However, courts are relatively reluctant to offer compensation. The cases can be understood as a special form of state liability.[37]

f) Special Doctrines: Administrative Practice and Retroactivity

Legitimate expectations can also stem from *court or administrative practice*, not just from action by the legislative or executive branch. Indeed, there is a comparatively strong burden on courts and administrative authorities to maintain consistent practice. Traditionally, this role has been attributed to the equal protection clause but logically it seems to fit better into the doctrine of the protection of legitimate expectations. The protection from changes in court or administrative practice is two-dimensional, based on a formal and a substantive component. The formal component requires that any change of practice should be duly announced so that private parties can adapt their behaviour accordingly. In this respect, a change of practice generates an obligation on the courts or administration which is comparable to that imposed on government to properly publish a new law that is to be introduced.[38] If this condition is fulfilled, courts and administrative authorities may choose any suitable means through which to introduce the change of practice. Somewhat in contrast, the substantive component of the test presents an opportunity to mount a substantial challenge to the change of practice, since change is only permissible if three conditions are met: namely, there are valid reasons for the change, the change is categorical, and the interest in the correct application of the law outweighs the interest in legal certainty.[39]

36 Häfelin/Müller/Uhlmann, n. 704.

37 See Häfelin/Müller/Uhlmann, n. 706; Pierre Tschannen, Systeme des Allgemeinen Verwaltungsrechts, Bern 2008, n. 291.

38 Cf. Häfelin/Müller/Uhlmann, n. 595 et seq.

39 Häfelin/Müller/Uhlmann, n. 591 et seq.; Tschannen/Zimmerli/Müller, § 23 n. 16.

Only limited expectations are created through the *law* itself. The Swiss Federal Supreme Court has laconically expressed the view that one must always expect the law to change.[40] While this is true, surely there is also an expectation that any change in the law will not be sudden and extremely disadvantageous to those individuals affected by it. Therefore, courts sometimes require the legislator to provide for transitional periods when introducing new legislation; this is an effort to mitigate the associated risks and negative effects. Since such an option is available to courts, it is a relatively rare occurrence for cases claiming a legitimate expectation created by the law itself to arise.[41]

More protection from a change in the law is available to individuals under the *doctrine of non-retroactivity*, a principle that has developed independently from the protection of legitimate interests but may, in my opinion, also find its most applicable basis in Article 9 Constitution.[42] Courts have intervened against the "proper retroactivity" ("echte Rückwirkung") of supervening laws regulating facts that evolved entirely in the past, e.g. compensation for unlawful police action at a certain point in time. They have only ruled in favour of such laws when they have identified a clear legislative intent, a substantial public interest, and the intention for the moderate application of retroactivity.[43] More deference is given where the law attempts to regulate ongoing circumstances, the so-called pseudo-retroactivity (*unechte Rückwirkung*).[44] For example, the legislator may legitimately lower the salary of a civil servant who is employed for a year after the first six months of employment. However, even in such a case, the protection of legitimate expectations may require that the cut is not overly substantial as the employee is likely to have planned his or her engagement on the assumption of a higher salary for the whole period.[45]

40 Cf. BGE 134 I 23, consideration 7.5.

41 Häfelin/Müller/Uhlmann, n. 641.

42 Häfelin/Müller/Uhlmann, n. 266.

43 See, inter alia, BGE 138 I 189, consideration 3.4.

44 Häfelin/Müller/Uhlmann, n. 284; Tschannen/Zimmerli/Müller, § 24 n. 28.

45 Federal Supreme Court decision of 15 December 1976, consideration 4 (printed in Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht 78 [1977], pp. 267).

6. Good Faith

The principle of good faith has a long tradition in Switzerland. Its original source was Article 2 Swiss Civil Code,[46] which targeted the grossly unfair behaviour of private parties: *"Every person must act in good faith in the exercise of his or her rights and in the performance of his or her obligations. The manifest abuse of a right is not protected by law."* Later, the principle of good faith was extended to cover behaviour both from and towards the state.[47] Nowadays, the principle is found in Article 5 III Constitution (which binds both the state and private parties) and in Article 9 Constitution as a fundamental right.

The principle of good faith forbids both contradictory behaviour and the abuse of rights. The *prohibition of contradictory behaviour* highlights the closeness of good faith to the protection of legitimate expectations: for example, an authority which requests the demolition of a property revoking an otherwise falsely issued building permit may violate the individual's legitimate expectations while also acting in a manifestly contradictory manner.[48]

The allegation of abuse of a right is often the applicant's last recourse for substantiating a claim. An older case involving a woman who was convicted for the manslaughter of her husband sheds some light on this proposition. Upon being released from prison after serving her sentence, she appeared again before the courts, claiming that she was entitled to a widow's pension. Apparently, she fulfilled all the necessary qualifications and nothing in the relevant legislation precluded her from getting the pension. However, the Swiss Federal Supreme Court had no difficulty in rejecting her claim for the pension as *"legal protection is only given to rights obtained in good faith"*.[49] The legislator later amended the relevant legislation, bridging an existing gap that up until then had been provisionally filled by court practice relying on the principle of good faith.[50]

46 Swiss Civil Code of 10 December 1907, SR 210; see for an English version of the Civil Code www.admin.ch (https://perma.cc/DV8N-FFT2).

47 See BGE 76 I 187; BGE 78 I 294; BGE 79 III 63.

48 See Häfelin/Müller/Uhlmann, n. 713.

49 Decision of the former Federal Insurance Court (now integrated in the Federal Supreme Court) EVGE 1951, p. 205, pp. 206. (cited after Häfelin/Müller/Uhlmann, n. 725).

50 Cf. Häfelin/Müller/Uhlmann, n. 725.

7. Prohibition of Arbitrariness (Reasonableness)

The prohibition of arbitrariness (Article 9 Constitution) is a very special, probably unique, feature of Swiss administrative and constitutional law. In a nutshell, it prohibits grossly erroneous administrative action, irrespective of whether the fault was legal or factual. A claim of arbitrariness may be invoked against the abuse of administrative discretion or against the violation of accepted legal principles, of reasonableness, or of natural justice.[51] In any case, the error by the administration must be *manifest* – although, as a former Swiss Federal Supreme Court judge cunningly put it, there is nothing more arbitrary than the doctrine of arbitrariness itself. The principle is often invoked when there are – typically for procedural reasons – no more specific grounds at hand to challenge state action.

51 BGE 141 I 70, consideration 2.2.

III. Forms of Administrative Action

1. Administrative Decisions

a) Omnipresence of Administrative Decisions

Administrative decisions can be jocularly considered the Pythagorean Theorem of Swiss administrative law. Admittedly, they are not part of the subject of advanced mathematics nor can they be considered as being even close in brilliance to the theorem. Despite this, it is certainly true that administrative decisions stand at the centre of many administrative doctrines. If one understands the notion of an administrative decision, one has securely mastered an understanding of the private-public law divide, the shallow waters of administrative contracts, regulations and their occasional crossover into individual acts, and the essence of a right or duty in administrative law.

Administrative decisions are *intrinsically linked* to *judicial protection* and *procedural rights*; they guarantee their existence.[52] One should further note that administrative decisions are the *common form of administrative action*. *"The power to administer includes the power to issue administrative decisions"*.[53]

Administrative decisions are attractive because they create *legal certainty*. They are also the bridge to – and a prerequisite for – *enforcement*.[54] Rights granted by administrative decisions cannot be easily revoked and they are protected under the doctrine of legitimate expectations. In practice, courts allow for the modification of administrative decisions if the facts or the law that formed the original basis of the decision have substantially changed.

52 See also Tschannen, n. 339 et seq.

53 BGE 115 V 375, consideration 3b; Tschannen/Zimmerli/Müller, § 29 n. 19.

54 Regina Kiener/Bernhard Rütsche/Mathias Kuhn, Öffentliches Verfahrensrecht, 2nd edition, Zurich/St. Gallen 2015, n. 852.

However, they will not modify administrative decisions if, for example, a private person has just missed the time limit to file an appeal.[55] In this respect, administrative decisions have a similar effect to court decisions. If they go unchallenged, they enter into legal force. However, this is certainly not to say that administrative decisions have absolute legal force. Court practice and legal doctrine demonstrate this through their handling of, for example, administrative decisions with an indefinite legal effect. For example, the Swiss driver's license does not have an expiration date but obviously it can be revoked in the case of serious traffic offenses.[56]

b) Definition of Administrative Decisions

The Federal Act on Administrative Procedure[57] provides for a definition of an administrative decision. In its (unofficial) English translation, Article 5 I reads as follows:

> *"Rulings are decisions of the authorities in individual cases that are based on the public law of the Confederation and have as their subject matter the following:*
>
> *a. the establishment, amendment or withdrawal of rights or obligations;*
>
> *b. a finding of the existence, non-existence or extent of rights or obligations;*
>
> *c. the rejection of applications for the establishment, amendment, withdrawal or finding of rights or obligations, or the dismissal of such applications without entering into the substance of the case."*

It is debatable whether the term "ruling" is the most suitable in this context, as this term is also often used to describe the administration's response to an inquiry on certain issues of an administrative nature (especially in taxation).[58] It seems that in practice the term "administrative decision" as it is used in this book is closer to *Verfügung* in German or *décision* in French. Instead of the term "administrative decision", one may also talk about an

55 Häfelin/Müller/Uhlmann, n. 1090; see also BGE 139 II 243, consideration 11.2.

56 See Article 15c I and Article 16c II Federal Road Traffic Act of 19 December 1958, SR 741.01.

57 Federal Act on Administrative Procedure of 20 December 1968 (Administrative Procedure Act, APA), SR 172.021; see for an English version of the Administrative Procedure Act www.admin.ch (https://perma.cc/2KU3-NLWU).

58 Häfelin/Müller/Uhlmann, n. 733; BGE 141 I 161, consideration 3.1; Thomas Fleiner/Alexander Misic/Nicole Töpperwien, p. 284.

"administrative act", which comes closer to the literal meaning of what is described as *Verwaltungsakt* in Germany or *acte administratif* in France. However, although the French and German terms share many elements with the Swiss concept of an administrative decision (unilateral, individual, rooted in public law) one should not equate them without due caution.

As a final remark, it should be mentioned that Swiss cantons do not necessarily have to adopt the definition of the Federal Administrative Procedure Act. However, they tend to do so in practice.[59] Even when they use other denominations, it is relatively safe to assume that in substance they follow the example set out by Article 5 Administrative Procedure Act.

c) Administrative Decisions Determining Rights and Obligations

An administrative decision *establishes, amends or withdraws rights or obligations*. Indeed, this is the *raison d'être* of an administrative decision.[60] Other forms of administrative actions may have legal consequences, which are not intended but at most accepted as necessary collateral damage in the fulfilment of the administrative act – for example, a police action, which accidentally leads to the harming of an innocent bystander. In contrast, administrative decisions purposefully determine, confirm, and stabilise a legal situation. One may have a right to build a house but not be legally permitted to do so before a permit has been granted in the form of an administrative decision. If the administration collects taxes, it will often do so in the form of an administrative decision, thereby concretising tax law in an individual case, establishing the citizen's duty to pay the tax and simultaneously establishing the basis for the decision's enforcement *ipso jure*. Administrative decisions can also be negative in substance: if a candidate for the bar exam fails, the commission will confirm the result through a negative decision (while also granting the right to appeal).[61] Finally, an administrative decision may simply confirm an existing legal situation ("*Feststellungsverfügung*")[62], thus providing legal certainty for the party requesting the confirmation (e.g. the confirmation that a certain private business practice is in accordance with

59 Häfelin/Müller/Uhlmann, n. 852.
60 Häfelin/Müller/Uhlmann, n. 867; Fleiner/Misic/Töpperwien, p. 285.
61 Cf. Häfelin/Müller/Uhlmann, n. 886; Tschannen/Zimmerli/Müller, § 28 n. 65.
62 Cf. Häfelin/Müller/Uhlmann, n. 889; Tschannen/Zimmerli/Müller, § 28 n. 62 et seq.

existing environmental regulation, hence excluding the risk of administrative sanctions in the future).

Usually, the most difficult assessment is to determine which administrative actions affect and change the legal situation of a private individual and thus must be issued formally as an administrative decision, and which do not. The administration would often prefer that it was not necessary to issue an administrative decision as this forecloses the right to appeal and avoids the initiation of a procedure, which would require all constitutional guarantees to be ensured throughout the process, such as the right to be heard.[63] Within this framework, the Swiss Federal Supreme Court has held that there must be an administrative decision before disrupting energy services from a public utility[64] or in cases involving the unsolicited transfer of a civil servant to another post,[65] whereas there is no need for an administrative decision where a post office is closed in a small rural community.[66] The Court ruled also that not only the university degree but also the issuance of single grades may constitute an administrative decision if the award of a distinction depends upon them.[67] In all the above cases, the Swiss Federal Supreme Court had to decide whether the state's actions had legal consequences for the individual. If the question was answered in the affirmative, an administrative decision was formally required.

d) Administrative Decisions as Individual Acts

It is quite clear from the legal definition of administrative decisions and from the afore-mentioned examples of such decisions that they concern individual cases. Swiss doctrine would typically label the decision as individual (one person) and concrete (one situation) (*individuell-konkret*), in contrast to rule-making, which is perceived as general and abstract (*generell-abstrakt*).

A critical matter under Swiss law are those cases which concern a concrete situation yet whose settlement has implications for the wider public, thus requiring the issuance of a so-called general decision (*Allgemeinverfügung*). The paramount example is traffic regulation, illustrated by a well-known case

63 Kiener/Rütsche/Kuhn, n. 315.
64 BGE 137 I 120, consideration 5.5; see also p. 238.
65 BGE 136 I 323, consideration 4.
66 Cf. BGE 109 Ib 253, consideration 1.
67 BGE 136 I 229, consideration 2.6.

which prohibited riding (and driving) on the banks of river *Töss*.[68] "General decisions" qualify as administrative decisions but with some modification in respect of the right to be heard (and the procedural rights that accompany this right) – in such cases, these rights are only granted to persons specifically affected by the decision. For example, in the aforementioned case, this would most likely be a homeowner living on the riverbank. The decision must be published and can be challenged by everybody potentially affected (typically almost everybody).[69] In contrast to a regular decision which will enter into force if not challenged in due time and which cannot be challenged beyond this point, a person affected by the sign may challenge its validity even after the decision comes into force (e.g. an equestrian from another canton that has been fined after riding on the riverbank).[70]

e) Administrative Decisions as Unilateral Acts

Swiss administrative law unfolds around the idea of the "sovereignty" ("*Hoheitlichkeit*") of administrative action. Administrative action entails that the state has the privilege to act unilaterally towards its citizens. In this sense, administrative decisions are *unilateral.* Yet, not all state action must be as such.[71] Indeed, the state may wave its prerogative and act through administrative or private law contracts, thus entering a bilateral agreement with citizens.

In theory, discerning a unilateral state action from an action that originated from an administrative or private law contract seems straightforward. However, this is not the case in practice. One must realise that administrative decisions of a sovereign state do not simply rain down onto unaware private subjects, not least because these subjects are often substantially involved in the decision-making process. One instrument, which ensures proper interplay between the state and private individuals, is the right to be heard, as mentioned above. Admittedly, this right is the channel *par excellence* for allowing an individual to negotiate with the administration. Furthermore, many administrative decisions require an application from an individual for the administration to *ex officio* regulate the case.

68 BGE 101 Ia 73.

69 Häfelin/Müller/Uhlmann, n. 943 et seq.

70 Häfelin/Müller/Uhlmann, n. 946.

71 Häfelin/Müller/Uhlmann, n. 843; Fleiner/Misic/Töpperwien, p. 285.

To determine whether a contract has been concluded one should examine the *level of discretion* on the administration's part. The administration will hardly act as if it is contractually bound if there is no room for negotiations because of detailed regulation; it will, however, act in such a way when it is party to a complex relationship with a private enterprise (for example an organisation that is paid to organise training for unemployed persons).[72] On some occasions the legislator has already prescribed the form of administrative action. A typical example of this is the employment of civil servants where the administration is legally required to act through the form of an administrative decision, if so decided by the legislator.[73] Finally, one should also keep in mind that administrative decisions are the usual form of action, hence placing the burden for justifying contracts onto the administration. In fact, regarding subsidies under federal law, the Act on Public Subsidies[74] explicitly embraces that rule in Article 16.

f) Administrative Decisions as Acts Under Public Law

Administrative decisions must be based on public law, as Article 5 Administrative Procedure Act explicitly states. This prerequisite seems self-evident. However, quite the opposite holds true when one considers the matter of the public-private law divide that the issuance of administrative decisions brings to the forefront. The Swiss Federal Supreme Court typically approaches critical cases by applying different theories, considering sovereignty (*Subordinationstheorie*), interest and mandate (*Interessentheorie* and *Funktionstheorie*), and – the only recently reactivated – consequences (*Modaltheorie*), eventually choosing the most suitable one for the case at hand.[75] This eclectic approach has been criticised but thinking of a better alternative remains a challenge.[76]

Public law (triggering the need for administrative decisions) is typically applicable if administrative actions are directly fulfilling public interests or a public mandate.[77] On the other hand, administrative actions may qualify as falling under private law if the agency seeks profit or to satisfy its own

72 E.g. BGE 128 III 250.

73 E.g. § 12 Act of the Canton of Zurich on the Public Personnel of 27 September 1988, 177.10.

74 Act on Public Subsidies of 5 October 1990, SR 616.1.

75 BGE 138 II 134, consideration 4.1.

76 Cf. Tschannen/Zimmerli/Müller, § 18 n. 6.

77 Häfelin/Müller/Uhlmann, n. 225 and 229.

affairs as a private party would do. If the agency benefits from special powers over private individuals, this can be considered as a clear indication of public law.[78] Finally, note that it may be that the legislator has already legally determined the nature of the administration's actions. In one case where the Swiss Federal Supreme Court had to decide on the question of whether the allocation of domain names is a private or public law action, it held that the legal relationship was one of private law. Although there was substantial public interest or even a public mandate for this activity, the legislator had provided for a private law setting, and the Court did accept this qualification.[79] The Swiss Federal Supreme court took a similar approach in a case involving the issuing of certificates of conformity provided by a private enterprise: this specific procedure was necessary to label a cheese "Gruyère AOC". The Swiss Federal Supreme Court determined the proceeding as an action under public law, reasoning that the possible sanctions imposed for failure to obtain such a certificate were comparable to restrictions on trade.[80]

g) Form

If one goes through the prerequisites of an administrative decision (an individual, unilateral act under public law determining rights and obligations), one may note that those do not prescribe a certain form that the decision must meet; instead they are substantive requirements. Indeed, the form of an administrative decision is a consequence of these substantive characteristics. An administrative decision must be handed down in writing, be named as such, give reasons for the way in which it has regulated an issue and inform the recipient of any available legal remedies.[81] If the administrative decision was not effectively delivered, it usually is contestable on this ground.

2. Administrative Law Contracts

It has already been pointed out that the administration may act as a contracting party and that contracts must be distinguished from administrative

78 Häfelin/Müller/Uhlmann, n. 223.

79 BGE 138 I 289, consideration 2.1; BGE 131 II 262, consideration 2.2.

80 BGE 138 II 134, considerations 4.5 and 4.6.

81 See, for administrative decisions based upon federal law, the Federal Administrative Court decision B-198/2014 of 5 November 2014, consideration 2.3.2.

decisions, the latter being imposed by the state unilaterally. Administrative contracts are certainly considerably rarer than administrative decisions. Many of their legal implications are disputed and it is not without reason that one scholar has termed them the "*liaison dangereuse*" of Swiss administrative law.[82]

A favourable aspect of acting under an administrative contract is its *stability*. Administrative contracts may grant "vested rights" ("wohlerworbene Rechte") that enjoy elevated protection under the doctrine of legitimate expectations. In fact, vested rights may not be abolished by future legislation, at least not without due compensation to the affected individual.[83] Vested rights create some noticeable tension between the need for administrative stability and state sovereignty. This is because these rights may restrict the state's ability to enact future legislation, as they are often guaranteed for an indefinite or at least a substantial period.[84] However, if the legislator was able to undermine or overrule such contractual rights through new legislation, it is equally clear that this would undermine administrative stability and the willingness of private parties to conclude contracts with the government. The Swiss Federal Supreme Court decided numerous cases regarding the extent of respect, which must be paid to vested rights;[85] this tends to vary depending on the substance of the contract. For instance, many employment contracts of civil servants do not create such rights at all or at least do not create unconditional ones.[86] In a case, which involved the incorporation of a private owner's land into the agricultural zone in exchange for the introduction of legislation that would increase the value of other pieces of land he owned, the question before the Court was whether the municipality could subsequently revoke this favourable legislation without compensating the owner. The Court accepted that the municipality refrained from introducing such legislation.[87]

82 Tschannen, n. 142.

83 Häfelin/Müller/Uhlmann, n. 1315.

84 Häfelin/Müller/Uhlmann, n. 1242.

85 See, inter alia, BGE 126 II 171; BGE 127 II 69; BGE 132 II 485.

86 See Federal Supreme Court decision 1C_230/2007 of 11 March 2008, consideration 4.1.

87 BGE 122 I 328.

3. Private Law Contracts

It has long been established that the administration may also conclude private law contracts. But as it is the case with administrative law contracts, the adminstrative authority must justify its decision to enter into a private law contract. Doctrine has largely been sceptical about the permissibility of the state "escaping into private law" ("Flucht ins Privatrecht").[88] Indeed, it does seem tempting for the authorities to act under private law contracts since it may evade many of the substantial and procedural guarantees of administrative law.

For that reason, court practice and doctrine essentially acknowledge limited areas where the administration may permissibly operate in the field of private law: public procurement, the management of financial assets of the state, and profit-oriented state action. It is also accepted that the legislator may introduce this form of administrative action to other fields.[89]

4. Informal Acts and State Liability

Administrative decisions and contracts share a common denominator: they affect the *legal situation* of citizens. In contrast, informal actions ("real acts"; *Realakte* according to Article 25a Administrative Procedure Act) of administrative bodies do not – at least not deliberately. The "deliberately" aspect is a key point; even if informal actions do actually affect a citizen's legal situation, they will still be classified as informal actions. Most actions performed within the framework of schools or hospitals do not amount to legal actions even though there is sometimes a fine line.[90] A police car patrolling in a neighbourhood does not trigger any legal effect; nor does the dissemination of governmental information.[91] Swiss cheese producers suffered substantial losses when the federal agency on public health warned about possible contamination of listeriosis in Vacherin Mont d'Or.[92]

To challenge such action, one can resort to a state liability claim in order to challenge informal acts but these cases are not easily won against the

88 Häfelin/Müller/Uhlmann, n. 1379.
89 See BGE 131 II 262, consideration 2.2; Tschannen/Zimmerli/Müller, § 42 n. 3.
90 Häfelin/Müller/Uhlmann, n. 1409.
91 Häfelin/Müller/Uhlmann, n. 1413.
92 BGE 118 Ib 473.

government (burden of proof, the necessity of qualified illegality of the state action etc.). The cheese producers were not successful.[93]

Due to such concerns a new provision was introduced into the Administrative Procedure Act: according to Article 25a Administrative Procedure Act, persons affected may require that an administrative decision is taken on informal acts that concern them specifically (such as the cheese producers). If granted, the administrative decision is subject to a challenge before the courts. The request may target past, current, or future administrative action and is directed to the administrative authority responsible for that action.[94] According to the wording of Article 25a Administrative Procedure Act, to have the legal standing to make such a request, one must prove an interest worthy of protection (a legal term similarly formulated in other administrative proceedings statutes).[95]

5. Administrative Rulemaking

In contrast to other countries, in Switzerland administrative rulemaking is not subject to specific procedural rules. Only legislation from Parliament is subject to compulsory public consultation.[96] However, if administrative rulemaking comes in the form of delegated legislation, it must respect the principle of legality.[97]

93 BGE 118 Ib 473, consideration 6.

94 Häfelin/Müller/Uhlmann, n. 1429.

95 See § 10c Administrative Procedure Act of the Canton of Zurich of 24 May 1959, 175.2.

96 Article 147 Constitution; Article 3 of the Federal Act on the Consultation Procedure of 18 March 2005 (Consultation Procedure Act, CPA), SR 172.061; see for an English version of the Consultation Procedure Act www.admin.ch (https://perma.cc/HS8B-2PVT). In particular, there is no right to be heard during the law making process, BGE 131 I 91, consideration 3.1.

97 Häfelin/Müller/Uhlmann, n. 368.

IV. Landmark Cases

1. State Liability: Vacherin Mont d'Or[98]

In 1987, an epidemic of the bacteria "listeria monocytogenes" emerged in Swiss soft cheese produced in the canton of Vaud (*Vacherin Mont d'Or*). Rather than prohibiting the selling and distribution, the Swiss federal authorities informed the public about possible health risks related to the consumption of Vacherin Mont d'Or. Seven producers of soft cheese brought an administrative claim (*verwaltungsrechtliche Klage*) before the Federal Supreme Court. The plaintiffs claimed that they suffered damages (drop in sales) through legally and factually wrong, inadequate, late, and inappropriate information by the Swiss authorities.

The Court reasoned that according to Article 3 of the Federal Act on State Liability[99] the state can be held liable for damage a civil servant unlawfully causes in carrying out his or her task. The conduct is considered to be unlawful if either certain legally protected interests are violated, focusing on the results of the conduct (*Erfolgsunrecht*), or if it is contrary to provisions of the statutory law, thus focusing on the conduct of the tortfeasor (*Verhaltensunrecht*). However, if official duties require a certain conduct, which is performed in a proper manner, such conduct is lawful.

The plaintiffs could not invoke any legally protected interests since pure assets are, as such, not legally protected and, consequently, pure financial loss does not qualify as *Erfolgsunrecht*. Thus, the Court considered whether the federal authorities, by informing about possible health risks, violated statutory law.

98 BGE 118 Ib 473.

99 Federal Act on State Liability of 14 March 1958, SR 170.32.

In particular, the Court examined Article 3 Epidemics Act[100], which governs information activities of the federal authorities related to combating infectious diseases. The Court emphasized that the Swiss Federation can only be held liable if the authorities informed in an unjustifiably erroneous manner. The Court found no such errors. Rather, the federal authorities, when informing on the health risks, duly took into account state-of-the-art scientific knowledge and made distinctions between different cheeses where such distinction was appropriate. Thus, the Court found that the authorities informed the public in line of Article 3 Epidemics Act; did not violate statutory law; and, accordingly, acted lawfully. The Court rejected the claim.

2. Protection of Legitimate Expectations: Piano Teacher[101]

X was a student in the training program at the Conservatory of the canton of Fribourg in order to obtain the necessary diploma to be a piano teacher. On June 26, 2008, he failed his final exam – a piano recital performed in front of an audience – due to a state of discomfort and emotional blockage.

The board of examiners allowed X to repeat the final exam in camera, i.e. without audience. On 13 October 2008 X passed said exam and the board of examiners handed him the signed minutes of the exam. Subsequently, he was informed by letter dated 14 October 2008 that he successfully completed the study program for the teaching diploma.

The director of the Conservatory, however, requested the competent agency – the Direction of Education, Culture, and Sport of the canton of Fribourg – not to issue a diploma since X did not perform publicly. On 2 March 2009 the Direction refused to issue the diploma. X's appeal to the Administrative Court of the canton of Fribourg was not successful. X challenged this decision before the Federal Supreme Court and requested that the Direction be obligated to issue the diploma.

The Federal Supreme Court reasoned that conducting the repeat exam without an audience conflicted with the relevant statutory law. Hence, the administrative act regarding the passing of the repeat exam was legally

100 Federal Act on Measures against Human Infectious Diseases of 18 December 1970, SR 818.101.

101 BGE 137 I 69.

erroneous. The Court, thus, examined whether the Direction could lawfully revoke the administrative act or whether instead X could invoke the protection of his legitimate expectations (Article 9 Constitution).

The Court emphasized that X had legitimate expectations to believe that the resolution of the board of examiners to renounce the public audience was lawful. Further, X made arrangements causally linked to his expectations by obtaining a post as piano teacher. Finally, the Court conducted the balancing test between legality and the expectations. From an overall perspective on the training program and the fact that piano teachers do not have to perform in public, the Court considered the attendance of the public during the final exam to be of minor importance. On the other hand, it emphasized the adverse consequences that X faced if the diploma would not be issued (repetition of a long study program, financial losses, and loss of earnings). The Court held that X's legitimate expectations outweighed the public interest in ensuring the proper application of the law and, as a consequence, the Direction was not allowed to revoke the administrative act.

3. Principle of Legality: Headscarf[102]

A and C attended public school in a municipality in the canton of Thurgau and wore Islamic headscarves. The school regulations contained the following provision: *"Students attend school neatly dressed. The trustful interaction requires the attendance of school without headgear. Hence, wearing caps, headscarves, and sunglasses during class is forbidden."* The school authorities dismissed the request of the two girls to be exempted from said regulation and barred them from wearing headscarves. The Administrative Court of the canton of Thurgau considered the ban to be based on an insufficient legal basis and disproportionate. Hence, it struck down the ban. The municipality challenged this decision before the Federal Supreme Court.

The Court reasoned that wearing the Islamic headscarf is protected by Article 15 Constitution (Freedom of religion and conscience) and that any restriction on fundamental rights must have a legal basis (Article 36 I Constitution). Such legal basis may not be *unduly vague* and, since banning headscarves constitutes a *severe* restriction on a fundamental right, must be issued by the *legislator*.

102 BGE 139 I 280.

The school authorities asserted that they were entitled to ban wearing Islamic headscarves based upon the purpose clauses of the cantonal act on elementary schools. The Court considered these provisions to constitute no sufficient legal basis for banning headscarves at schools, namely against the background of the predictability and foreseeability of governmental action.

Further, the school authorities asserted that, based upon a statutory *delegation clause* – i.e. an act made by the legislator –, the organizational planning of the school is in their scope and that they have, accordingly, the right to issue school regulations. The Court reasoned that the school authorities, based upon said delegation clause, may issue certain internal rules. However, it found that the asserted delegation clause does not concern in any way the restriction of fundamental rights such as the freedom of religion and conscience and that, consequently, the elements of delegated legislation were not met. Thus, the Court held that there was no legal basis for banning headscarves at schools.

4. Principle of Proportionality: Hooligans[103]

In Switzerland, the cantons established the Concordat on Measures to Combat Violence during Sports Events (so-called "Hooligan-Concordat") which has been in force in all cantons since 15 November 2007. On 2 February 2012, the Hooligan-Concordat was revised. It implemented further-reaching measures against persons involved in violence. Inter alia, the revised concordat stipulated that

- exclusion orders (*Rayonverbot*) must last at least one year under any given circumstances; and
- the duration of the reporting obligation (*Meldeauflage*) must mandatorily be doubled if such obligation is breached without excusable grounds.

Against the accession of the cantons of Aargau and Lucerne two complaints were filed before the Federal Supreme Court. The Court examined, inter alia, the revised provisions regarding the measures mentioned above by way of abstract judicial review.

103 BGE 140 I 2.

The Court reasoned that exclusion orders restrict the right to freedom of movement (Article 10 II Constitution). Such measures must – apart from being based on a legal basis and pursuing a legitimate public interest – be *proportionate*. Further, the Court reasoned that, on one hand, the revised provision completely bars authorities from issuing *any* exclusion order in less severe cases where only orders of less than one year would be proportionate. On the other hand, the minimum time limit of the exclusion order prevents the authorities from adjusting the measures on a case-by-case basis as required by the principle of proportionality. Thus, the Court held that the respective provisions violate the principle of proportionality.

Similarly, the Court questions whether a duplication of the reporting obligation is the least restrictive measure under any circumstances. Rather, the provision constitutes a rigid automatism that does not leave any margin of discretion to the authorities in the individual cases. The Court consequently held that such automatism violates the principle of proportionality. It rescinded the mentioned provisions provision of the Hooligan-Concordat.

Selected Bibliography

Patricia Egli, Introduction to Swiss Constitutional Law, Zurich/St. Gallen 2016

Thomas Fleiner/Alexander Misic/Nicole Töpperwien, Constitutional Law in Switzerland, Alphen aan den Rijn 2012

Ulrich Häfelin/Georg Müller/Felix Uhlmann, Allgemeines Verwaltungsrecht, 7th edition, Zurich/St. Gallen 2016

Regina Kiener/Bernhard Rütsche/Mathias Kuhn, Öffentliches Verfahrensrecht, 2nd edition, Zurich/St. Gallen 2015

Pierre Moor/Alexandre Flückiger/Vincent Martenent, Droit administrative, Vol. I, les fondements, 3rd edition, Bern 2012

Thierry Tanquerel, Manuel de droit administratif, Geneva/Zurich/Basel 2011

Pierre Tschannen, Systeme des Allgemeinen Verwaltungsrechts, Bern 2008

Pierre Tschannen/Ulrich Zimmerli/Markus Müller, Allgemeines Verwaltungsrecht, 4th edition, Bern 2014